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ABSTRACT

This fifth chapter of "The Yearbook of School Law, 1986" summarizes and analyzes state and federal court decisions handed down in 1985 involving claims of torts (civil wrongs, other than those involving breach of contract) committed by elementary or secondary educational institutions or personnel. Among the topics reviewed are claims of negligence (particularly negligence resulting in injury to students); defenses against claims of negligence (including governmental and statutory immunity); claims of educational malpractice; cases involving liability insurance and workers' compensation; and claims of defamation and of assault and battery. Other cases before the courts involve interference with contracts, products liability, and constitutional torts. (PGD)

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TORTS

Richard S. Vacca and William J. Evans, Jr.

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INTRODUCTION

A tort is a civil wrong, other than breach of contract, for which a court will generally provide remedy in the form of money damages. The wrong grows out of harm to an individual by the unreasonable conduct of others. The remedy is premised on the theory that a person should be allowed to recover something, usually money, from the one

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who harmed him.[1] There are two types of tort discussed in this chapter: the *intentional tort* (e.g., assault and battery) and the *negligent tort*.

At first glance one might think that the increasing number of tort suits taken against public school divisions, school boards, administrators, and teachers is a direct result of our living in a "suit conscious" society. Despite the fact that such a thought is not totally erroneous, it is not the primary reason. The working relationship itself, between professional and student, is conducive to producing litigation.

Anyone who has ever worked with students knows that when they are placed together in the confines of a classroom, a shop, a gymnasium, a laboratory, or even when groups of kids are playing in the open space of a playground, one of them may get hurt no matter what precautions are taken. More often than not these injuries are very slight and no one sues. But, every now and then, an injured student takes his case to court.

In tort suits, four factors must be established by the plaintiff in order to bring negligence home to the defendant: (1) that the defendant owed a duty to the injured plaintiff; (2) that the defendant in some way breached that duty; (3) that defendant's breach was the proximate cause of the injury suffered by the plaintiff; and (4) that the injured party suffered actual loss.[2]

This chapter treats elementary and secondary school tort cases decided in 1985. Cases involving school boards, school officials (board members, superintendents, principals), school employees (teachers, coaches, bus drivers), and students are included.

NEGLIGENCE

Negligence is established when one's actions fall below a standard of care expected of the average person, and the result is an injury. The behavior expected of school personnel is that which is measured against what a reasonable and prudent professional of similar training and experience would do, or should have done, in the same or similar circumstances. Against that standard, a court will then determine whether liability may be imposed.[3] Numerous negligence ac-

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1. Certain intoductory remarks made in subsections of this chapter are taken directly from Hudgins & Vacca, Law and Education: Contemporary Issues and Court Decisions (The Michie Company 2d ed. 1985).

2. *Id.* at 78.

3. *Id.* at 85. The elements of negligence and the standard of reasonable fore-

tions also have been taken against school systems, school officials, and teachers claiming inadequate supervision as the proximate cause of student injury. There is no uniform standard provided in case law to measure adequate, necessary, and proper supervision of students. What is adequate, necessary, and proper is purely situational.

Student Injuries

Schools are responsible for maintaining a safe and healthy environment in which learning can take place. The following cases illustrate how injuries to students, while they were in the school setting, resulted in a variety of lawsuits with varying outcomes.

School Settings During School Hours. The theory of comparative negligence, as well as the standard of ordinary care, came into play in a Washington State case. A student (an eighteen-year-old male with a mental age of eleven) was injured when his shirt caught fire as he stood in front of a forge in a metal shop. Applying the standard of ordinary care to the situation, a jury found the injured student to be 70% negligent, thus reducing his $50,000 damage award to $15,000. On appeal, the court ruled that the trial judge's instruction to the jury regarding the standard of care owed the student was appropriate.[4]

In another case, the Arkansas Supreme Court emphasized the futility of trying to "shelter a growing child from every possible danger."[5] When an eight-year-old child became severely brain damaged as the result of hanging himself, three employees and the school board were sued. The complaint alleged, among other things, that the school board was negligent for failing to adopt a detailed supervisory program of safety and hazard identification. Seeing the intentional act of the child as the proximate cause of the injury, the court ex-

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seeability are discussed in Independent School Dist. No. 14 v. AMPRO Corp., 361 N.W.2d 138 (Minn. Ct. App. 1985). A recent case containing a discussion of the nature and elements of negligence is Muncy Area School Dist. v. Gardner, 497 A.2d 683 (Pa. Commw. Ct. 1985).

4. Higgins v. East Valley, 704 P.2d 630 (Wash. Ct. App. 1985). In Alban v. Board of Educ., 494 A.2d 745 (Md. 1985), the court held that a handicapped student placed in a regular eighth grade physical education class is subject to the same "reasonable standard of care" as are all other students in the class.

5. Garthright v. Lincoln Ins. Co., 688 S.W.2d 931 (Ark. 1985).

plained that schools are not like factories where rigid safety regulations are more appropriate.

The reasonableness of a teacher's classroom conduct, as well as the appropriateness of summary judgment, were the issues in a New York case. A student was injured by fire when her teacher attempted to use ditto fluid to light a flame in order to boil water in a classroom demonstration of a steam engine. The teacher had followed the same procedure without incident several times over a ten year period. The trial court entered an order for partial summary judgment and an appeal was taken. To the appellate court, a summary judgment is granted in negligence cases only where there is no conflict in evidence, and where defendant's conduct falls far below any permissible standard of care. That was not so here, where there existed issues of fact as to whether flammable liquid was poured on an open flame, and whether the teacher's conduct was unreasonable under the circumstances. Thus, the court held that there were issues of fact requiring trial.[6]

Also in New York, an eighth grade student suffered injury while in an English class. The injury occurred prior to the beginning of the class when another student flipped a pen onto a desk causing the eraser to separate and strike the plaintiff in the eye. At the time, the teacher was standing in the doorway between the hall and the classroom, carrying out her supervisory duties as specified in the *Faculty Handbook*. The parents of the injured student brought suit against both the school system and the teacher.[7] At trial, summary judgment was granted to defendants. On appeal, the court agreed with the trial court and said that a school board "is not the insurer of the safety of students, and that a school teacher may be charged only with reasonable care such as a parent of ordinary prudence would exercise under comparable circumstances."[8] To the court, it was the intervening act of the other student, not the failure of the teacher to supervise, which was the proximate cause of the plaintiff's injury.[9]

When a young Louisiana student was injured in a fall from horizontal bars during a kindergarten recess, his father sued both the father of a second student, who allegedly caused the fall, and the school board. The plaintiff argued that the school board and its

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6. Troyan v. Central School Dist., 493 N.Y.S.2d 803 (N.Y. App. Div. 1985).

7. Rock v. Central Square School Dist., 494 N.Y.S.2d 579 (N.Y. App. Div. 1985).

8. *Id.* at 580.

9. *Id.* For another case demonstrating the importance of showing that negligence of a school district was the proximate cause of an injury see, Pedersen v. Joliet Park Dist., 483 N.E.2d 21 (Ill. App. Ct. 1985).

teacher employee were negligent in their supervision of the recess period and that the failure to supervise directly led to the injury. The district court awarded judgment against the father of the other student, but dismissed the suit against the school board. The plaintiff appealed the trial court's refusal to find liability on the part of the board. The basic issue before the appellate court was whether, during recess, a teacher/student ratio of less than one to approximately 100 constituted "adequate supervision" precluding a finding of liability.[10] In affirming the trial court's decision, the state court of appeals agreed that constant supervision of all pupils is not required. In fact, said the court, "it is virtually impossible absent ball and chain."[11] Thus, based upon the facts of the case the school board and its employees were not found negligent in their supervision of the children during the recess.[12]

In another supervision-related case, suit was brought against an Illinois teacher and school board to recover for injuries sustained by a nine-year-old when he moved a desk from one room to another at the teacher's direction. The defendants, said the mother of the child, were both negligent and guilty of willful and wanton conduct. The trial court granted defendant's motions for summary judgment, finding that teachers are not liable for ordinary negligence in matters within the teacher-student relationship, and that the complaint did not allege facts demonstrating willful and wanton conduct by the defendants. On appeal, the court saw the activity of the student moving the desk as not beyond the ambit of a teacher's supervisory function. Thus, the defendants were immune from liability. In addition, the court concluded that the alleged failure to properly supervise the injured student's activity did not constitute willful and wanton conduct.[13]

Lack of adequate supervision became an issue in a Minnesota case when a student was injured while his teacher was out of the room. The incident took place in an advanced woodworking class, where the student injured his thumb while using a power saw. In denying damages to the plaintiff-student, the jury was convinced that

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10. Collins v. Bossier Parish School Bd., 480 So. 2d 846 (La. Ct. App. 1985).

11. *Id.* at 848. In Ferguson v. Desoto Parish School Bd., 467 So. 2d 1257 (La. Ct. App. 1985) the court dismissed a wrongful death action, explaining that only with constant and undeviating supervision could an accident, in which a nine-year-old student was struck in the head by a softball bat, have been prevented.

12. *Id.* In Stephenson v. School Bd. of Polk County, 467 So. 2d 1112 (Fla. Dist. Ct. App. 1985), the court determined that the factual allegations were insufficient to state a cause of action against the school board for negligent supervision of its employees.

13. Guyton v. Roundy, 477 N.E.2d 1266 (Ill. App. Ct. 1985).

the matter had taken place so rapidly that the teacher could not have prevented it, even if he had been present in the room.[14]

An allegation that a Louisiana classroom teacher breached her duty of supervision became the issue when a twelve-year-old male student was injured as a result of "horse-play" with another student. The injured student was jumping up and down outside a classroom and was involved with another student who was inside the classroom, but had his head outside the window. The teacher had told both students to stop their misbehavior and to go back into class. However, the child who had been jumping up and down injured his hand when he swung it at the window. To the court, the proximate cause of the child's injury was not a breach of the teacher's standard of reasonable care and supervision of her students.[15]

Negligent supervision by a classroom teacher also was the focus of a case addressed by a Florida court. An exceptional child (emotionally disturbed) had been mainstreamed in a middle school vocational education class. The student fell victim to a sexual assault, in full view of the other students, while the substitute teacher was away from the class. Emphasizing the existence of a student/teacher relationship which gave rise to the teacher's legal duty to supervise the class, the court was of the opinion that the teacher's failure to actively supervise was the proximate cause of the student's injuries.[16]

In another case, a Tennessee appellate court held that both the school board and shop teacher were liable for damages suffered by a fourteen-year-old ninth grade student who had been struck in the head by a drill bit from a drill press operated by a fellow student in shop class. A trial court found the drill press operator at fault, and the teacher and board not liable. In reversing that decision, the appellate court said that the board and teacher breached their duty to act reasonably and prudently by their failure to supervise the shop activity, and by their failure to foresee the kind of injury that occurred. Even though teachers are not the insurers of student safety, the fact that the teacher had not given careful instruction to the inexperienced drill press operator prior to his using the machine was a significant factor in the appellate court's evaluation of the situation.[17]

In Pennsylvania, a teacher had designed a classroom activity for her students to simulate the hostage crisis in Iran. As a part of the activity, a student was blindfolded and escorted around the school

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14. Fallin v. Maplewood-North St. Paul Dist., 362 N.W.2d 318 (Minn. 1985).
15. Henix v. George, 465 So. 2d 906 (La. Ct. App. 1985).
16. Collins v. School Bd., 471 So. 2d 560 (Fla. Dist. Ct. App. 1985).
17. Roberts v. Robertson County, 692 S.W.2d 863 (Tenn. Ct. App. 1985).

building by another student. While blindfolded, the student inadvertently fell down several steps and injured her mouth. The parents of the injured child sued the school district alleging negligence in failing to provide proper supervision. Citing Pennsylvania's governmental immunity statute, the trial court granted summary judgment for the school district. The parent appealed unsuccessfully.[18] The court held that failure to supervise the activities of students did not fall within the statute's real property exception. Supervision or lack of supervision of school children, said the court, is not within the scope of care, control, and custody of real property. In other words, the proximate cause of the child's injury was not the board's failure to maintain a safe stairway.[19]

En route to and from School. In New York, a student also raised the issue of a school system's failure to supervise and control students. The plaintiff was on a bus being used to transport students to a track meet when he was injured. He received multiple corneal abrasions of the left eye caused by a rock thrown by another student. This case reached the court five years later and was intended to increase the *ad damnum*.[20] The court explained that it would be necessary for the plaintiff to make a two-fold showing: (1) an affidavit giving the merits of the case, reasons for delay, and the facts warranting an increase in the judgment; and (2) a doctor's affidavit showing a causal connection between the injury and a constant course of treatment. However, the plaintiff was unable to meet the requirements established by the court.

Also in New York, a personal injury suit was brought on behalf of a child who suffered an injury to her right eye after being struck with a snowball on school property. The student was in the process of entering the school when the incident occurred. The trial court entered an order denying the school district's motion for summary judgment, and the school district appealed. The appeals court held that the school district was not liable for injury to the child. In the court's opinion, even though the incident took place on school grounds, the school district did not have prior notice of snowball throwing on school property. Also, there were no facts indicating the existence of a special danger.[21]

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18. Mooney v. North Penn School Dist., 493 A.2d 795 (Pa. Commw. Ct. 1985).
19. *Id.* at 796-97. In Landry v. Jefferson Davis Parish School Bd., 478 So. 2d 194 (La. Ct. App. 1985), a suit involving the injury to a student's hand by a glass door, it was explained that a physical inspection of the door, by the court, was discretionary rather than required.
20. Dolan v. Garden City, 493 N.Y.S.2d 217 (N.Y. App. Div. 1985).
21. Carr v. Indian Lake School Dist., 496 N.Y.S.2d 950 (N.Y. App. Div. 1985).

In Detroit, the mother of a young female (who had been raped by three men on her way home from school) filed suit against the school board alleging, among other things, that the incident was a result of the board's negligence. According to the mother, school officials had been informed that her daughter was frequently harassed as she walked to and from school. As a result, an arrangement was made whereby (1) the mother would transport her daughter, and (2) the daughter would be allowed to call home, if the school schedule permitted, so that a ride could be arranged. Yet, the daughter was refused use of the phone on the day she was raped, the pay phones were not available, and she was forced to leave the school with the other students. At trial, the court entered a summary judgment for the board. On appeal, the appellate court affirmed the trial court decision. On the issue of negligence, the court concluded that the board was cloaked with sovereign immunity in connection with the operation of the schools.[22] (For additional cases where the immunity defense was raised, see the subsections on Common Law and Statutory Immunity.)

School Buildings and Grounds. A duty that must not be breached is the maintenance and safety of the school environment. While one cannot assure that a school environment will be accident-free, prudence must be practiced to lessen the possibilities of an accident happening. The major responsibility for providing and maintaining a safe school environment rests with the school system and its employees.

In Connecticut, a jury decided in favor of an eighth grade student who had been injured when she pushed the glass surface of a swinging door and it shattered. The jury ruling was upheld on appeal. Evidence demonstrated that the door had no crash bar and no written warning not to push the glass windows to open them in case of fire. Furthermore, three months before, another student had been involved in a similar incident. To the Connecticut Supreme Court, failure to post warnings was the proximate cause of the hand injuries. The court also noted that had timely inquiries into previous accidents been undertaken, the danger posed by the unmarked doors would have been foreseen and, if reasonable prudence was exercised, the risk could have been eliminated.[23]

Cf. Valez v. Our Lady of Victory Church, 486 N.Y.S.2d 302 (N.Y. App. Div. 1985), (where a seven-year-old student was not entitled to recover for injuries sustained when a school desk toppled on her. There was no evidence the school had any notice, actual or constructive, of a defect in the desk).

22. Evans v. Detroit Bd. of Educ., 373 N.W.2d 246 (Mich. Ct. App. 1985).

23. Bielaska v. Town of Waterford, 491 A.2d 1071 (Conn. 1985).

The unsafe condition of a long jump pit was the focus of a case out of Massachusetts. A student was injured when he performed a long jump into a pit of sawdust that is normally filled to a depth of twelve to fourteen inches. However, on the day of the injury there were only two to three inches of sawdust in the pit. To the court, such a condition was unsafe.[24]

In another case, a six-year-old who had been watching a Louisiana high school football team practice suffered injury. Following the conclusion of the practice, the child and two playmates began playing their own game of football at the edge of the field where, in uncut grass, there was a broken chain link fence. The child suffered injury to his ankle when he fell on the fence. Several days after the incident the injured child developed a bacterial infection in his ankle joint, requiring hospitalization for thirty days. In addition to suffering damage to the ankle, the child suffered a permanent but minor hearing loss due to prolonged use of an antibiotic. In holding the school board negligent, the court ruled that the board could not claim immunity under state statute. What is more, neither the contributory negligence nor the assumption of risk defense (focusing upon the responsibilities of the injured child's parents) applied in this case.[25]

School-related Activities. In a Washington case, the mother of a deceased student (who was killed when she was driving her car home from a senior "release day" party where liquor was consumed) sued the school district for negligence. According to the suit, the principal and faculty advisor were aware that the participants would consume liquor. To the court, mere knowledge of these factors was not enough to establish liability.[26]

A Louisiana court reviewed a case involving an injured nine-year-old child who fell from gymnastics rings in a high school gymnasium.[27] On the evening of the incident, the injured child and his parents attended a dance recital in the school's auditorium. While on his way to the water fountain, the child noticed the unlocked gym where the ring set was located. Some older boys in the gym invited him to play and he did. After he grabbed the rings, one of the boys then pulled him back and let him swing forward. The child flipped off the

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24. McInnis v. Town of Tewksbury, 473 N.E.2d 1160 (Mass. App. Ct. 1985). For a case in which a student slips and falls on a wet floor at school see, Poitier v. School Bd., 475 So. 2d 1274 (Fla. Dist. Ct. App. 1985).

25. Fusilier v. Northbrook Excess and Surplus Ins. Co., 471 So. 2d 761 (La. Ct. App. 1985).

26. Rhea v. Grandview School Dist. 694 P.2d 666 (Wash. Ct. App. 1985).

27. Dunne v. Orleans Parish School Bd., 463 So. 2d 1267 (La. 1985).

rings and fell to the gym floor, injuring his head and shoulder. The high school principal testified that the ring set, when not in use, was secured by a rope to the wall above the bleachers, about twelve to fifteen feet above the floor. Removal of the rings usually was accomplished with the aid of a pole. The principal also testified that the outside doors of the gymnasium were kept locked, but that it was impractical to keep the doors to the gym from the hallway locked. The janitorial staff also required access late at night for cleaning.

Action was brought to recover against the school board. The trial court entered judgment for the plaintiff and the board appealed. The court of appeals affirmed the lower court decision and concluded that the board's failure to lock the doors was a cause-in-fact of the accident. On further appeal, the state supreme court disagreed with the appeals court and noted that a determination of cause-in-fact does not necessarily result in liability. The key inquiry was whether a duty was imposed on defendants, and whether the risk which caused the accident was within the scope of the duty.[28] Furthermore, the state supreme court was of the opinion that the suspended ropes did not present an unreasonable risk of harm in normal use, which did not include swinging. The court then concluded that the scope of the board's duty did not encompass the risk that a small child would be enticed by older boys to grab rings which had been removed by some person for whom the board was not responsible. To the court, there was no association between any duty imposed on the board and the injury which occurred. Thus, the board was not liable for this accident under a duty-risk analysis.[29]

EDUCATIONAL MALPRACTICE

The first and most vital teacher duty is that of providing students with adequate and proper instruction. There are two basic judicial interpretations of the term instruction. First, students should not be

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28. *Id.* at 1269. For an examination of the concept of willful tortious acts see Acker v. Spangler, 500 A.2d 206 (Pa. Commw. Ct. 1985). *See also* Newby v. Lake Zurich Community School, 482 N.E. 2d 1061 (Ill. App. Ct. 1985) and Rice v. Lee, 477 So. 2d 1009 (Fla. Dist. Ct. App. 1985).

29. *Id.* at 1270. *See also* Independent School Dist. No. 14 v. AMPRO Corp., 361 N.W.2d 138 (Minn. Ct. App. 1985); and Pesek v. Discepolo, 475 N.E.2d 3 (Ill. App. Ct. 1985) (a student was raped at home by another student who was truant at the time the rape took place. Suit was brought against the parents of the rapist, as well as against the school. The court did not accept the argument that since the school acts *in loco parentis* it should have been liable under the same theory as the parents. Both complaints were dismissed for failure to state a cause of action).

subjected to an activity in school unless first receiving complete instruction from the teacher on how to carry out the activity. Second, teachers owe their students proper instruction that will lead the students to the mastery of certain basic skills and subject matter. Both types of instruction were in court this past year.

In a New Jersey case, a student took action against the school board and regional high school district for failure to provide a special remedial education to assist him to overcome academic deficiencies. The trial court had dismissed the complaint, concluding that educational malpractice is not a recognized cause of action. Plaintiff appealed.[30] The appellate court affirmed the ruling of the trial court, stating that the school system's failure to provide plaintiff with a special remedial education was not actionable because it fit within no specific liability provision of the Tort Claims Act. However, the court explained, even if the plaintiff's cause of action did fall under the Tort Claims Act, it would have been dismissed for failure to comply with the notice of claim requirements of the Act.[31]

Allegations of educational malpractice coupled with negligent supervision formed the basis of a suit for damages in a New York case.[32] Two children were subjected to harassment, verbal abuse, foul language, and death treats which lasted for nearly a year. As a result, the parents stated that they were told to keep their children home because "it was too dangerous" for them to come to school. The parents alleged that negligent handling of the problem caused emotional distress to both children, as well as to them. State trial court granted the school district's motion to dismiss for failure to state a cause of action and the parents appealed. Regarding the educational malpractice claim, the court held that the students could not maintain an action for lost education and training due to the school's alleged failure to supervise other students. What is more, the parents could not recover from their emotional distress. But, said the court, the school district's handling of the situation was negligent, thus stating a claim against the district upon which relief could be granted.[33]

A New Jersey case examined the role of an instructor in a different light. An injured player alleged that he was hurt by the opposing

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30. Meyers v. Medford Lakes Bd. of Educ . 489 A.2d 1240 (N.J. Super. App. Div. 1985). For another type of "malpractice" case see Berger v. State, 698 P.2d 399 (Mont. 1985), where the court saw no real injury suffered, thus no recovery arising from placement of a student in special education.

31. *Id.* at 1242.

32. Cavello v. Sherburne-Earlville Cent. School Dist., 494 N.Y.S.2d 466 (N.Y. App. Div. 1985).

33. *Id.* at 467-68.

players whose coach had instructed them to play hockey intensely and aggressively. To the court, a coach cannot be held responsible for the acts of his players unless it is shown that he either taught them how to do the act that caused the injury, or he instructed them to commit the act.[34]

NEGLIGENCE DEFENSES

Immunity

The sovereign immunity traditionally enjoyed by school boards and school officials is not, as a general rule, extended to employees. Despite the fact that employees at times propose immunity as a defense, the doctrine of *respondent superior* seldom applies. Numerous reasons exist as to why courts seldom disturb the doctrine of sovereign immunity. The main reason is that schools are state agencies, created by state law, to perform a governmental function.

Common Law (Governmental Immunity). A New York case involving a claim of negligence was brought by a teacher, rather than a student. In an action that tested the standard of care owed to teachers, the plaintiff alleged that she was injured when attacked as she entered the school after her lunch break. She instituted the action claiming that her injuries were proximately caused by her reliance on the presence of front-door guards, who were not at their post when the incident occurred.[35] Both the trial and appellate courts were of the opinion that the mere act of hiring additional front-door guards did not create a special duty of care to protect this teacher against the criminal acts of third parties on school grounds. Absent evidence that the guards were hired specifically to protect her, or a limited class of teachers of which she was a member, security provisions at a public school were not held to create a special duty of care upon which governmental liability could be predicated.[36]

The Fifth Circuit was faced with the following issue: are Junior Officer Training Corps (JROTC) instructors "employees" of the United States Government within the meaning of the Federal Tort Claims Act?[37] The action began when an eighteen-year-old high

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34. Nydegger v. Don Bosco Prep., 495 A.2d 485 (N.J. Super Ct. Law Div. 1985).
35. Corcoran v. Community School Dist. 17, 494 N.Y.S.2d 747 (N.Y. App. Div. 1985).
36. *Id.* at 755.
37. Cavazos v. United States, 776 F.2d 1263 (5th Cir. 1985).

school student was rendered a quadriplegic as a result of an injury suffered at an unofficial practice session of the JROTC drill team. The activity took place on school grounds. Such practices violated both JROTC and school rules, but had been a frequent occurrence. The injury was sustained when students engaged in horseplay just before the practice began. The student, by and through his guardian and mother, sued the United States alleging negligence in supervision by the JROTC instructors.[38] A federal district court dismissed the complaint. On appeal, the Fifth Circuit held that JROTC instructors are not employees of the federal government for whose negligence the government could be held liable.[39]

In a case emanating from Michigan, a woman who had slipped and fallen on a sidewalk covered with light snow sued the school district for medical expenses, lost wages, and pain and suffering. After the jury verdict in favor of the school district, the trial judge refused to grant a motion for a new trial or judgment and the plaintiff appealed. The appellate court affirmed the decision.[40] In rendering its opinion, the court made the following statement regarding immunity and the duty of the board to correct dangerous conditions on school property:

> While generally immune from tort suit, school districts remain liable for negligent maintenance of entrance walks to buildings under their control . . . A governmental agency is liable for bodily injury and property damage resulting from a dangerous or defective condition of a public building if the agency had actual or constructive knowledge of the defect and, for a reasonable time after acquiring knowledge, failed to remedy the condition or to take action reasonably necessary to protect the public against the condition.[41]

The court further explained that budgetary matters have a bearing on whether a school district acted within a reasonable time to correct such a condition.

When a student's grandmother brought action for injuries suf-

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38. *Id.* at 1263-64.

39. *Id.* at 1266. For a case wherein the court had to determine the question of whether a person was a "public employee," see Smith v. Steinberg, 481 N.E.2d 1344 (Mass. Ct. App. 1985).

40. Dristy v. Waterford School Dist., 379 N.W.2d 428 (Mich. Ct. App. 1985).

41. *Id.* at 430. In Rollins v. Concordia Parish School Bd., 465 So. 2d 213 (La. Ct. App. 1985) the court held that the custodian of a "defective" thing is strictly liable for injuries caused by that defect.

fered when she stepped on a sunken water drain grill, an Oklahoma court held that the construction and maintenance of a high school parking lot, with its alleged sunken drain grill, were operational or ministerial rather than discretionary acts of the school board. Thus, no immunity attached to the board while plaintiffs suit was reinstituted and remanded with directions to proceed.[42]

The Supreme Court of North Dakota heard a case involving an injury to a student by another student on a playground. The trial court entered summary judgment dismissing the action. To the court the doctrine of governmental immunity included both the board and the teacher.[43]

On appeal, the Supreme Court of North Dakota agreed with the grant of immunity to the board, but did not agree that the doctrine extended to the teacher. In the complaint, the plaintiff alleged (1) that the teacher in charge failed to perform her responsibilities carefully by not segregating persons who may constitute a danger to others, and (2) that this failure was the direct and proximate cause of the injuries suffered. The teacher was named in the suit in both her role as an agent of the board and in her individual capacity. Thus, the trial court's summary judgment was found to be in error.[44] The case was remanded on the issue of the teacher's liability for negligence. That issue involved ascertaining the facts and applying relevant law.

Suspected child abuse formed the issue in an Oregon case when a teacher referred a child to Children's Services after observing scratches on his neck. The child had said initially that a cat scratched him, but later confessed that his mother had choked him. The parents sued saying that the school system's actions caused their child to be placed in a foster home. The court held that the school people were cloaked with immunity in such matters.[45]

In Wisconsin, a student was injured when a steel drum he was cutting open with an acetylene torch exploded. The action had been taken at the direction of his teacher. A personal injury suit was brought against the shop teacher, school district, and the district's insurer (State Farm). State Farm counterclaimed seeking that the trial court declare a maximum recovery of $25,000 per claim.[46] At

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42. Robinson v. City of Bartlesville Bd. of Educ., 700 P.2d 1013 (Okla. 1985).

43. Reule v. Bismark Pub. Dist., 376 N.W.2d 32 (N.D. 1985).

44. *Id.* at 33. In Belcher v. Jefferson County, 474 So. 2d 1063 (Ala. 1985), the court held that county school boards in Alabama are "arms of the state" and partake in the state's sovereign immunity.

45. McDonald v. State, 694 P.2d 569 (Or. Ct. App. 1985).

46. Keefer v. State Farm Fire and Casualty, 377 N.W.2d 632 (Wis. Ct. App. 1985).

trial, it was conceded that the teacher was acting within the scope of his employment, and that the school district was a governmental subdivision. The court also noted that the teacher was performing a ministerial function, and granted summary judgment to the district regarding the statutory recovery limitation. To the court, the statute limited the exposure of the school district as a governmental body, but did not limit an employee's exposure when sued in his individual capacity.[47] On appeal, the sole issue was whether state law limited recovery from a governmental employee to the statutory amount. In reversing in part the trial court's order denying State Farm's motion for summary judgment, the court concluded that limiting governmental tort liability to a maximum of $25,000 per claim was applicable to individual government employees. Thus, the teacher was protected from liability in excess of that figure.[48]

Statutory Immunity. In a Texas school district, a principal, teachers, the state Future Farmers' Association, and others were named as defendants. The suit resulted from injuries suffered by a student in an explosion of one of the floats in a parade. The float, which was approved by the principal and teacher-sponsor (FFA), was carried on a truck and consisted of a mock Apollo space capsule. It contained a small amount of black powder designed to emit smoke when ignited by an electric spark. The smoke device did not ignite as planned, so the plaintiff used his cigarette lighter. The device exploded, injuring the plaintiff and one other person. A county district court granted summary judgment in favor of the defendants with respect to claims of the injured parties, and cross actions by other defendants. Appeal was taken to the Texas Court of Appeals where it was contended that the summary judgment was precluded by the existence of fact issues concerning whether there was a cause of action within the waiver of governmental immunity under the Texas Tort Claims Act.

According to the appellate court, the incident was not within the exception to governmental immunity for injuries and damages arising from use of a motor vehicle. Therefore, the school district was immune, even though the accident occurred on a motor vehicle. Furthermore, the court concluded that (1) the actions of the principal and

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47. *Id.* at 633.

48. *Id.* at 644. For another decision in which the protection of the teacher for alleged negligence hinged upon a determination of whether that teacher acted within the scope of employment see, Casey v. Tieman, 493 N.Y.S.2d 572 (N.Y. App. Div. 1985).

teacher did not come within the exception to qualified professional immunity pertaining to use of the motor vehicle; and (2) the principal and teacher, acting within the scope of their duties in approving and supervising school sponsored floats, did not waive personal immunity with regard to the explosion.[49]

Interpreting the state's tort claims act also was the issue in a Pennsylvania case. A student had been injured while moving a piano at the direction of her teacher, and summary judgment had been granted by the trial court. When the case reached the appeals court, it was held that both the school district and teacher were immune from liability for injuries since the piano was not "real property" within the meaning of the law.[50]

Governmental immunity was disputed in two cases that originated in Philadelphia. In the first case, suit was filed for wrongful death of a student who drowned in a motel swimming pool. The deceased was a participant on a field trip to another state when the incident took place. The court held that the district was immune under that state's tort claims act.[51]

Similarly, in the second case the district was held not liable on a plea of governmental immunity in a suit against it by a person who was taken to an unlighted school playground, beaten, and assaulted. The plaintiff had claimed that the school district was negligent for failing to secure the playground gate and to adequately light the area.[52]

In another Pennsylvania case, the plaintiff was shot while on the school steps and suffered serious and permanent injuries. His parents sustained extensive financial expenses and, as a result, filed a complaint against the city of Philadelphia and the school district. The city and school district filed preliminary objections in which they asserted immunity under state law. The trial court sustained the objections, and the plaintiff appealed. The appeals court agreed that the school system was immune from liability. Absent a flaw in the real estate as

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49. Pierson v. Houston Indep. School Dist., 698 S.W.2d 377 (Tex. Civ. App. 1985).

50. Vince v. Ringgold School Dist., 499 A.2d 1148 (Pa. Commw. Ct. 1985). *See also*, Garcia v. Los Angeles Unified School Dist., 219 Cal. Rptr. 544 (Cal. Ct. App. 1985).

51. Davis v. School Dist. of Philadelphia, 496 A.2d 903 (Pa. Commw. Ct. 1985). For another field trip case see Swearinger v. Fall River Joint Unified School Dist., 212 Cal. Rptr. 400 (Cal. Ct. App. 1985).

52. Joner v. Board of Educ., 496 A.2d 1288 (Pa. Commw. Ct. 1985). *See also*, Beardell v. Western Wayne School Dist., 496 A.2d 1373 (Pa. Commw. Ct. 1985).

the proximate cause of the student's injuries, there was no cause of action against either the city or the school district.[53]

A student who was injured when his chemistry teacher dropped a flaming beaker, alleged that the teacher was negligent for failing to take adequate measures to control the area immediately surrounding the experiment.[54] In response to the student's appeal of a summary judgment, the teacher claimed the defense of governmental immunity as outlined by Pennsylvania law. The court determined that the accident was not related to the care, custody, or control of real property, and therefore did not preclude the school district from raising immunity as a defense.

Other Defenses

In addition to claims of immunity, other defenses apply to negligent tort actions. Any one, if established, will absolve the defendant of liability. Four of these defenses are: assumption of risk (which presupposes that an individual understands, appreciates, and agrees that in undertaking an activity he subjects himself to possible injury); comparative negligence (where both plaintiff and defendant are jointly responsible for the injury); contributory negligence (where it can be proven that the injured individual directly contributed to his own injury); and notice of claim (where timely notice of a claim against a school district must be made).

Assumption of Risk. In a New York case, a trespasser sued a swimming pool owner and lessee school to recover for injuries suffered in a diving accident.[55] The plaintiff, then age twenty, dove head first into a swimming pool located on the property owned by Kissena Park Jewish Education Center and leased by Flushing County Day School, Inc. The plaintiff-trespasser was left a quadriplegic as a result of the dive. He and a number of friends had gained entry to the pool through a hole in the fence and had swam around for approximately forty-five minutes, during which he was able to familiarize himself with the varying depths of the pool. Later, he climbed a life guard chair and executed several dives. In his suit for damages, he claimed that the defendants owed him a duty of reasonable care, and

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53. Ziccardi v. School Dist., 498 A.2d 452 (Pa. Commw. Ct. 1985).

54. Usher v. Upper Saint Clair School Dist., 487 A.2d 1022 (Pa. Commw. Ct. 1985).

55. Boltax v. Joy Day Camp, 493 N.Y.S.2d 590 (N.Y. App. Div. 1985).

that foreseeability was the appropriate measure of liability. Furthermore, he claimed that the fence was negligently maintained, and argued that if the pool had been better secured, he would never have been injured.[56] The New York Supreme Court, Appellate Division, held that the plaintiff's miscalculated dive was the sole cause of his injuries, and that defendants were not liable. In the court's opinion:

> Liability should not attach merely because a resourceful determined trespasser was able to find a way to gain entry to the premises. At best, the hole in the fence "merely furnished the occasion for the accident to occur, rather than its proximate cause." . . . A person who engages in such sport as swimming, accepts the known dangers inherent therein.[57]

Comparative Negligence. Both comparative negligence and assumption of risk were the issues in a New York case where a student teacher was injured when she fell off a donkey during a donkey basketball game. The game was a fund-raising event at her school, and was staged under contract by the Buckeye Donkey Ball Company. Plaintiff sued both the school district and the company. She settled her claim against the school board before trial, but pursued her suit against the Buckeye Donkey Company.[58] The case is of value to school people for what it says about assumption of risk. To the court:

> [t]he existence of such an express assumption of risk by the injured party is a matter of defense upon which the burden of proof will be on the party claiming to have thus been absolved of duty . . . and will be a factual issue for the jury, unless there is no real controversy as to the facts . . .[59]

In this case, said the court, there is evidence from which a jury could conclude that plaintiff had knowledge of the risk. She participated in the game voluntarily and assumed the risk; furthermore, conduct in mounting the donkey was the cause of her injury. She would have been entitled to a comparative causation charge on implied assumption of risk had she not been told before it began that "participants are at their own risk."[60] In view of that, her participation in the game constituted an express agreement to assume the risk, entitling defendant to a directed verdict in its favor.

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56. *Id.* at 592.
57. *Id.*
58. Arbegast v. Board of Educ., 480 N.E.2d 365 (N.Y. 1985).
59. *Id.* at 372.
60. *Id.*

Notice of Claim. A school parking lot injury resulted in suit in a Colorado case. A school system moved to set aside a default judgment in an action where the plaintiff had alleged that she slipped, fell, and was injured in a junior high school parking lot. Subsequently, service of process was to be made to the secretary of the board of education. However, the summons and complaint were served to another secretary in the board offices. That secretary then telephoned the board's insurance carrier and advised that the suit had been filed. She claimed that she then mailed copies of the summons and complaint to board attorneys and to the insurance carrier. The documents were not received, and later the plaintiff obtained a default judgment against the school district.[61] The district moved to set aside the judgment, and the trial court denied the option, because there was no showing of "excusable neglect" sufficient to justify such an action. The school district appealed. Affirming the trial court, the Colorado Court of Appeals explained that either upon a showing of good cause by the defendant, or upon showing an abuse of discretion on the part of the trial court, a motion for default judgment could be set aside. Additionally, the court stated that excusable neglect is more than identifying negligence or carelessness; rather, it occurs when there has been a failure to take proper steps at the proper time as a result of some unavoidable hindrance or occurrence.[62] Here, the school district could not sustain such a defense.

A Connecticut student, who allegedly was injured during a physical education class, brought an action naming the borough of Naugatuck as the sole defendant.[63] After the trial court's decision that the borough was not a proper party and could not be held liable, a new action was brought against the board of education and the teacher in charge of the class. The defendant moved for a summary judgment based on the applicable statute of limitations. The plaintiff argued that the prior action was concluded summarily because his attorney sued the wrong party, and asked for application of a statute which

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61. Plaisted v. Colorado Springs School Dist. No. 11, 702 P2d 761 (Colo. Ct. App. 1985). A late notice of claim was permitted in a case involving the death of a person repairing a roof in Law v. Rochester School Dist., 486 N.Y.S.2d 540 (N.Y. App. Div. 1985). For a decision denying service of a late notice of claim see Klejmont v. Washingtonville Cent., 488 N.Y.S.2d 437 (N.Y. App. Div. 1985). For a recent case where the court held that a late notice of claim was permitted in a case involving an incident in a gym see, Pepe v. Somers Cent. School Dist., 485 N.Y.S.2d 315 (N.Y. App. Div. 1985).

62. *Id.*

63. Morrissey v. Board of Educ. of Naugatuck, 491 A.2d 1126 (Conn. Super. Ct. 1985).

would negate the affect of the two year statute of limitations. The court agreed and denied the motion for summary judgment.

LIABILITY INSURANCE

Whether a school board's purchase of liability insurance constituted a waiver of sovereign immunity for liability for student injuries was the issue in a South Dakota case. Plaintiff's complaint alleged that her nine-year-old son suffered a third-degree burn on his leg when, as a result of the negligence of school employees, hot soup spilled on him in the school cafeteria. At the time, the school district had a liability insurance policy in effect. Plaintiff conceded that school districts were immune from such suits under state law, but further argued that by purchasing liability insurance, the state had waived immunity of the school district and its employees. The trial court dismissed the suit on sovereign immunity grounds, and the Supreme Court of South Dakota affirmed. To the state high court, the purchased of a liability policy did not constitute a waiver of sovereign immunity.[64]

A different result was reached by the Supreme Court of Georgia where it was held that the existence of a liability insurance policy purchased by the county board of education constituted a waiver of governmental immunity *pro tanto*, with regard to an action brought by the parents of an injured six-year-old student. The student had been injured in a fall from a slide on the playground of the school.[65]

Insurance also furnished the issue in a case out of California, where a school administrator's insurer sued the administrator's school district and its automobile liability insurer to recover an amount paid to a person injured by the administrator's negligent operation of his automobile. At trial, judgment was entered in favor of the school district and the decision was appealed. In this appeal for reconsideration, the administrator asserted that the district's general liability insurance included primary coverage for any district liability. To this claim the appellate court held that no general liability coverage was applicable. Next, appellant claimed that the "business auto" provision of the policy covered "any auto" driven by a district employee on business. That argument also failed.

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64. Holland v. Yankton School Dist., 375 N.W.2d 199 (S.D. 1985).
65. Thigpen v. McDuffie County Bd. of Educ., 335 S.E.2d 112 (Ga. 1985).

This California opinion is valuable to school boards and administrators for what it says about the notion of acting within the scope of employment. In making such a determination one must look to certain factors including: (1) whether the act in question is of the kind the employee was required to perform; (2) whether the act occurred substantially within authorized limits of time and space; and (3) whether the employee was motivated, at least in part, by a purpose to serve the employer. In this case, the administrator's trip to supervise a school dance was held, as matter of law, to be within the scope of his employment.[66] This was true even though he and his wife stopped to eat, and his route to the dance was one of his own choosing.

A similar issue was disputed before a state appeals court in Georgia where a nine-year-old girl, who had disembarked from her school bus, was seriously injured on a highway when struck by a truck. The question to be resolved by the court was whether the student's injuries were covered within the purview of the school system's insurance policy. The policy in question provided fleet coverage to vehicles (mainly school buses). The key language in the policy included "ownership, maintenance, or use" of the school bus. To the high court, "use" of the bus continued until the student had crossed the immediate road and was in a place of safety in the direction towards her home. Moreover, the court was of the opinion that the "use" of the vehicle includes unloading of the bus in addition to transportation to and from school. Also, while the bus is standing with its lights flashing, stop signals on, and visual signals functioning, the children disembarking therefrom are under its protection. The court held that school bus "use does not conclude until the bus stops operating as a school bus in relation to the child."[67]

In a Louisiana case, the court of appeals decided a case involving a bus accident. In the light rain, a school bus collided with a car driven by the plaintiff, who was injured and later brought suit against the school bus driver, his personal insurer, and the school board. At trial, the bus driver insisted that the plaintiff was driving with his lights out, which the plaintiff denied. The trial court viewed the situation as an emergency, and determined that the accident had

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66. California Casualty Ins. Co. v. David Douglas School Dist., 702 P.2d 1115 (Or. Ct. App. 1985).

67. Georgia Farm Bureau Mutual Ins. Co. v. Greene, 329 S.E.2d 204 (Ga. Ct. App. 1985). For two other school bus accident cases see, Toney v. South Carolina Dep't of Educ., 327 S.E.2d 322 (S.C. 1985), and Aberant v. Wilkes-Barre Area School Dist., 492 A.2d 1186 (Pa. Commw. Ct. 1985). *See also* Schwetz v. Employers Ins. of Wassau, 374 N.W.2d 241 (Wis. Ct. App. 1985).

happened so fast the plaintiff could not react to avoid the bus.

In this case, the school board brought an incidental action against the bus driver and his insurer for any damages the board may be compelled to pay. The trial court rendered judgment on the third party claim as requested, and limited recovery to the contractual maximum of $15,000. The bus driver appealed.[68] To the appellate court, the employment relationship imposed on the employer a financial responsibility for the damages caused by its employee "in the course and scope of his duties."[69] Additionally, except in rare cases "where the employer is also guilty of fault in causing an accident, the employer's liability is only vicarious . . . Whenever the obligor is liable for the same performance, the obligors are solidary."[70] In the court's opinion, the school board had a right to bring an incidental action against the bus driver and his insurer for indemnity where a judgment awarding damages in a personal injury suit was entered against the bus driver and the school board.

While acting as a sponsor for the school newspaper, a Wyoming teacher became entangled in a battle over the publication of a satirical cartoon. After being refused permission to publish the cartoon, she enlisted the help of the American Civil Liberties Union. She contended that because of her activities she was harassed, demoted, and subjected to emotional suffering. When she sought damages, the school district informed its insurance company that it expected the company to defend and cover the lawsuit. The district court holding was that the actions of the school were intentional and not an "occurrence" within the meaning of the comprehensive general liability policy. Additionally, the alleged emotional suffering did not constitute "bodily injury" within the meaning of the policy.[71]

Mississippi school officials successfully defended a suit resulting from the physical assault and sexual molestation of an eleven-year-old female student whom, it was alleged, they negligently allowed to be taken away from school by an unauthorized male. The district court allowed the officials recovery from the school district's insurer for attorney fees and other costs. The court of appeals reversed that holding explaining that the insurance coverage was limited only to wrongful acts that result in damage other than personal injury. Therefore, the

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68. Finley v. Bass, 478 So. 2d 608 (La. Ct. App. 1985).

69. *Id.* at 615.

70. *Id. See also* McDaniel v. Clarkstown Cent. School Dist. No. 1, 494 N.Y.S.2d 885 (N.Y. App. Div. 1985).

71. St. Paul Fire & Marine Ins. v. Campbell County, 612 F. Supp. 285 (D.C Wyo. 1985).

school officials could not recover the fees and costs incurred in their defense.[72]

EMPLOYEE INJURIES/WORKERS' COMPENSATION

In New Jersey, an employee of the board of education held three positions: mathematics teacher, head football coach, and golf coach. After attending an evening football coaches' banquet, the petitioner was involved in an automobile accident which left him a totally and permanently disabled paraplegic. The sole issue was whether the wages considered in determining the compensation rate should be an aggregate, or based only on the salary paid for coaching football.[73] The Department of Labor, Division of Workman's Compensation, determined that the three jobs were independent of each other and that the petitioner was working in his capacity as a football coach at the time of the accident. Therefore, it was on the basis of that salary alone that his compensation was based. The trial court agreed.

On appeal, the court ruled that the petitioner's employment should not be considered three separate employments. This is particularly true, the court continued, where the qualification for one of the jobs is conditioned upon the qualification for another.[74] Thus, the court reversed and remanded the case for entry of a judgment based on an aggregate of the petitioner's wages.

ASSAULT AND BATTERY

A North Carolina student brought suit against the county board of education and the assistant principal of the high school for assault and battery based upon the administration of corporal punishment.[75] After action was dismissed by the trial court, the student appealed.

The court of appeals held that a child may recover for excessive punishment, but that there is no recovery if the punishment is reasonable in light of its purpose.[76] Additionally, corporal punishment in the state was not proscribed by international law made applicable in the state by the United Nation's Charter.[77]

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72. Foreman v. Continental Casualty Co., 770 F.2d 487 (5th Cir. 1985).
73. Stack v. Boonton Bd. of Educ., 488 A.2d 1032 (N.J. Super. App. Div. 1985).
74. *Id.* at 1034.
75. Gaspersohn v. Harnett County Board of Educ., 330 S.E.2d 489 (N.C. Ct. App. 1985).
76. *Id.* at 493.
77. *Id.* at 497.

DEFAMATION

A false and intentional communication that ridicules or disgraces another person can be grounds for tortious action. In such an instance, the action is not for damages from physical injuries, but rather for injury to reputation.

A state education administrator in Iowa brought a libel action against a teachers' union and two of its employees for statements published in a union newsletter.[78] The defendants admitted the writing, publication, and dissemination of the document, but denied that the writings were defamatory and that the plaintiff had suffered any injury. Their affirmative defenses included truth, jest, and various privileges.

The court held that the statements in the newsletter constituted libel, and that the evidence was sufficient to support a finding of actual malice. The implication that the plaintiff was not a fit administrator was determined to have been made with reckless disregard of the truth. The rhetorical question of whether the plaintiff had ever sold mail order swamp land in Florida, was cited as an example of a statement not made in good faith.[79] The award of $75,000 was upheld as not being excessive.

Three Oregon teachers who had earlier been drinking while attending an end-of-the-year retirement party, were involved in an automobile accident. Following the incident, the school board voted disciplinary action against the three. In failing to uphold their libel action, the court of appeals explained that the teachers were unable to prove any actionable publicity by the district, or that the district's actions constituted outrageous conduct.[80]

In Louisiana, a teacher brought a defamation action, as well as a challenge to the school board's decision to place him on probation and insert a reprimand in his personnel file.[81] In remanding the defamation action, the court explained that the truth or falsity of the board's words were not the issue, but rather whether the board complied with the law. The grievance policy which had been followed did not protect the board from torts it commits.[82]

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78. Kelly v. Iowa State Educ. Ass'n, 372 N.W.2d 288 (Iowa Ct. App. 1985). For a case in which a school district unsuccessfully sues a former superintendent for defamation, see Garcia v. Board of Educ. of Socorro Consol. School Dist., 777 F.2d 1403 (10th Cir. 1985).

79. *Id.* at 298.

80. Trout v. Umatilla County School Dist., 712 P2d 814 (Ore. 1985).

81. Brown v. Red River Parish School Bd., 469 So. 2d 1110 (La. Ct. App. 1985).

82. *Id.* at 1115.

Three brothers, who were members of a politically prominent New York family, brought libel action against school board candidates who circulated campaign literature which claimed that the incumbent school board, bowing to political clout, enacted and backdated a resolution creating tax exemption for property owned by the brothers.[83] The plaintiffs contended that the words "sting" and "backdate" implied that they were con artists and swindlers who engaged in a criminal conspiracy.

The court held that the language at issue was not reasonably susceptible to a defamatory meaning, and that the use of "political clout" was an expression of opinion rather than a statement of fact. Finally, the court explained that it was clear that all plaintiffs were public figures who must prove actual malice in order to recover damages for libel. This they were unable to do.

A black third-grade teacher in Alabama, brought defamation action against other teachers, school officials, and a yearbook publisher.[84] The plaintiff had declined to have her picture taken for the school's yearbook. In place of her picture there appeared a cartoon drawing of a monkey sitting on a swing holding a banana, with the caption "out munching" to the side and the teacher's name printed underneath. She alleged that the picture was a racial insult and described her as being a lazy monkey who was somewhere eating when she should have been in the classroom teaching students. The court held that, as a matter of law, the cartoon and caption were not reasonably susceptible of the alleged defamatory inferences. The only reasonable inference to be drawn was that a picture of Mrs. Harris was not available.

TORTIOUS INTERFERENCE WITH A CONTRACT

A former high school principal in Wyoming brought an action against parents, students, and teachers who had complained about him to the school board. He claimed that they intentionally interfered with his contractual relations and, as a result, inflicted emotional distress on him. The trial court granted summary judgment in favor of the defendants, holding that the information (furnished by the defendants) did not cause the board to discharge the principal, and that the

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83. Pace v. Rebore, 485 N.Y.S.2d 291 (N.Y. App. Div. 1985).

84. Harris v. School Annual Publishing Co., 466 So. 2d 963 (Ala. 1985). In Cahill v. Board of Educ. of City of Stamford, 502 A.2d 410 (Conn. 1985), a libel case instituted by a teacher against a school board was dismissed as the teacher had failed to exhaust available administrative remedies.

claim for intentional infliction of emotional distress was unjustified.[85] On appeal, the Supreme Court of Wyoming affirmed the lower court ruling. Regarding the issue of intentional interference, the court said that the defendant could be held liable only if a loss was suffered as a direct result.[86] As to intentional infliction of emotional distress, mere complaining about the principal's alleged conduct was not "outrageous."[87]

A teacher employed by the Catholic Diocese of Joliet, Illinois had signed a contract for the next year, but resigned when offered a public school position at a higher salary. The principal of the Catholic school contacted the principal of the public school to protest the hiring. Following that contact, the teacher was relieved of her duties for two weeks before having her contract broken. Subsequently, the Diocese informed her that her contract had been cancelled. The plaintiff appealed the trial court's dismissal of her contract, alleging intentional interference with contractual relations.[88] The court explained that the elements essential in such a case include: (1) existence of a valid and enforceable contract between the plaintiff and another; (2) defendant's awareness of the contract; (3) defendant's intentional and unjustified inducement of a breach of that contract; (4) a subsequent breach of the contract by the third party caused by the defendant's action; and (5) damages. As all the necessary elements had been set forth by the plaintiff, the court found the dismissal by the trial court to be in error, and remanded the case for further proceedings.

A former chief of security at a California high school brought suit after the school district terminated his employment by eliminating the high school security department.[89] The plaintiff claimed that the action was a subterfuge masking the district's true purpose, which was to terminate his employment. At a school board meeting, in closed session, two options for the dismissal of the plaintiff had been discussed: termination due to insubordination; and termination because of lack of funds. The latter option, citing only lack of work and

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85. Spurlock v. Ely, 707 P2d 188 (Wyo. 1985).

86. *Id.* at 190. Campbell v. Board of Educ., 333 S.E.2d 507 (N.C. 1985), offers another example of a tortious interference with a teacher's contract. In Gardner v. School Dist. No. 55, 700 P2d 56 (Idaho 1985), it was held that an educational association had not tortiously interfered with a superintendent's contractual relationship with the school district. The association had written a letter to a local newspaper protesting the creation of an administrative position for the superintendent, who had not had his contract renewed.

87. *Id.* at 191-93.

88. Richmond v. Hahn, 481 N.E.2d 943 (Ill. App. Ct. 1985).

89. Short v. Nevada Joint Union High School Dist., 210 Cal. Rptr. 297 (Cal. Ct. App. 1985).

lack of funds, was recommended by the school's counsel and was approved by the board.

The court applied a "but for" test recently adopted by the National Labor Relations Board and used in a California labor relations case.[90] This would invalidate the district's action if it would not have occurred but for the impermissible reason. Once the plaintiff produced evidence sufficient to make a *prima facie* showing that an improper motive played a part in his termination, the burden of persuasion shifted to the employer to show that the termination would still have occurred even if the improper reason had not been present. On appeal, the trial court's directed verdict was reversed in part with the holding that whether the school district would have made the decision to eliminate the security department irrespective of staff discontent with the plaintiff, was a question for the jury. However, since neither the administration nor the district induced breach of contract, the court affirmed that those parties could not be held liable on a theory that they conspired to do so.

PRODUCTS LIABILITY

In a New Jersey case, a plaintiff sustained injuries in a football game when he used his head as an initial point of impact in tackling a ball carrier. The helmet he was wearing was made by MacGregor and sold to the Moorestown Township Board of Education. These helmets were then supplied to the ball players. The injured player, along with his parents, sued the school board for negligent techniques of its coaches, and also sued both the manufacturer and the reconditioner. Relief sought was in the form of damages.[91]

Each year after the season the football helmets were sent by the board to a reconditioning company where they were repaired and given postseason storage. The reconditioning process consisted of inspecting each helmet, replacing broken parts (from spare parts supplied by the manufacturer), repainting, cleaning, and sterilizing. In addition to a label saying that the helmet had been reconditioned, another label inside the helmet said, "CAUTION: Serious neck or head injury can result while playing football despite our efforts to protect the individual. OLYMPIC RECONDITIONING COMPANY." MacGregor never placed a warning inside the helmet.

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90. Martori Brothers Distributors v. Agricultural Labor Relations Bd., 631 P2d 60 (1981).

91. Gentile v. MacGregor, 493 A.2d 647 (N.J. Super. Ct. Law Div. 1985).

In this case, the focus of the court's attention fell squarely on the reconditioners (not on the school board and not on MacGregor) on a theory of strict liability. A superior court judge had ruled that the reconditioners were not "sellers" under proper interpretation of the law governing warranties, therefore plaintiff could not recover under a breach of warranty theory. Also, the trial court saw no strict liability cause of action against the reconditioners. On this last point, the appellate court disagreed. In its view, there was no reason to conclude that the strict liability cause of action did not exist, where the reconditioners represented the helmet as being safe for use, and where they dealt with a significant volume of helmets which were then reintroduced into use.[92] Additionally, the board "relied upon the expertise of the recondititioners to make valid judgments on the all-embracing safety status of the helmet. The board did not request a mere mechanical servicing of the helmet; it asked for the exercise of expertise dealing with the overall safety of the helmet."[93] In the court's opinion, "the reconditioners reasonably should have been aware that their expertise was being called upon in this regard."[94]

CONSTITUTIONAL TORTS

A high school student in Texas brought a civil rights action to recover from injuries sustained in a work shop class.[95] Citing the fourteenth amendment and 42 U.S.C. section 1983, the plaintiff argued that the defendant's alleged negligent actions deprived him of constitutionally protected liberty interests in freedom from damage to his body integrity. Additionally, this harm, whether intentional or negligently inflicted, occurred when the plaintiff was compelled by state law to attend school.

The district court explained that not every tort or trespass committed by a state official or government is a violation of constitutional rights.[96] While sympathetic to the plaintiff's assertion that he is entitled to a safe environment in school, the court determined that the acts in question, even if negligent, were not sufficiently egregious as to be constitutionally tortious.[97] Therefore, the defendants were entitled to summary judgment as a matter of law.

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92. *Id.* at 631.
93. *Id.* at 631-32.
94. *Id.* at 632.
95. Voorhies v. Conroe Indep. School Dist., 610 F. Supp. 868 (D.C. Tex. 1985).
96. *Id.* at 873.
97. *Id.*